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No. 83-343

IN THE

Supreme Court of the United States

October Term, 1983

ROUSE SI SHOPPING CENTER, INC.,

Petitioner

v.

MORSE DIESEL, INC., DEN-AL REALTY CORP., ESPOSITO CONCRETE CO., INC., NORTH EASTERN FABRICATORS, INC., DOMINICK NATALE, d b a NATALE PLUMBING AND HEATING CO., SETTE & JULIANO CONSTRUCTION CORP., EAST END WRECKING CORP.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAULA SCHWARTZ FROME, ESQ.
Attorney for Respondents
1501 Franklin Avenue
Mineola, New York 11501
(516) 742-9415

GEORGE R. GRIDELLI
LEONARD R. BERSON
RONALD S. KAHN
RALPH P. CASSELLA
of Counsel

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COUNTERSTATEMENT OF THE CASE

In 1981 Rouse SI purchased a shopping center known as the Staten Island Mall in Richmond County, New York, for cash consideration of $32,750,000. It engaged Morse/Diesel, Inc., to act as its construction manager and agent in making improvements to the Mall. Preliminary budgets were prepared, bids were obtained from various trade contractors, including the other respondents herein, and after approval of such bids by Rouse SI, Morse/Diesel executed the various contracts for the work as Rouse SI's agent.

The construction activities were geared to substantial completion in time for the 1981 Christmas retail season and, although Rouse SI had ordered changes in the work, the Mall was substantially completed in time.* Immediately thereafter Rouse SI refused to pay the requisitions of various contractors, including respondents. In March, 1982, mechanic's liens were filed by the respondents herein, and a foreclosure action was commenced in the Supreme Court of the State of New York, County of Richmond.

Immediately prior to the commencement of the foreclosure action, Rouse SI commenced the instant action in the United States District Court for the Southern District of New York alleging, *inter alia*, the unconstitutionality of the New York Lien Law. Pending the determination of the District Court action respondents' State Court lien foreclosure action was stayed.

The District Court, in dismissing the action below, held that the [third] cause of action challenging the constitutionality of the New York Lien Law failed to state a claim upon which relief could be granted. It relied upon the authority of *Carl A. Morse, Inc. v.*

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*The total value of all the renovation work performed was in excess of $4,000,000; and the liens filed herein aggregate about $1,000,000.

Rentar Industrial Development Corp., 439 U.S. 804, wherein this Court previously upheld the constitutionality of the challenged portions of the New York Lien Law. It also held that no diversity jurisdiction existed to sustain Rouse SI's other claims.* The decision was affirmed by the Second Circuit. Petitioner now seeks a writ of certiorari for review of the Second Circuit's affirmance of the dismissal of the third cause of action.

REASONS FOR DENYING WRIT

I

THE CONSTITUTIONALITY OF THE LIEN LAW HAS BEEN SETTLED BY THIS COURT

There is no necessity for granting the writ because the constitutionality of the New York State Lien Law has been passed upon by this Court in *Carl A. Morse, Inc. v. Rentar Industrial Development Corp.* 439 U.S. 804 (1978) *dismissing for want of a substantial federal question appeal from* 43 N.Y. 2d 952. This Court has held in *Hicks v. Miranda* 422 U.S. 332 (1975), that dismissals for want of a substantial Federal question are dispositions on the merits, binding on lower federal courts, as to issues precisely raised therein. In *Carl A. Morse, Inc. v. Rentar Industrial Development Corp., supra* (hereinafter "*Rentar*"), the issues were whether the New York Lien Law was a deprivation of property under the 14th Amendment and whether the New York Lien Law contained sufficient due process safeguards to fulfill constitutional standards. Appellants' jurisdictional statement at 14-15, *Rentar*, No. 77-1775. Those are precisely the issues raised by plaintiff herein.

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*A companion action brought by Rouse SI solely against Morse/Diesel, Inc. was also subsequently dismissed by the District Court upon its finding of lack of diversity jurisdiction.

Plaintiff's attempt to blunt the precedential effect of the dismissal in *Rentar* is unpersuasive. Plaintiff seeks to convince this Court, as it unsuccessfully asserted in the courts below, that the dismissal in *Rentar* is not dispositive of the constitutional issue raised therein because the appellees in *Rentar* had argued, in their motion to dismiss or affirm, that there were state factual issues which precluded disposition of the Federal issues. However, under the holding of this Court in *Cox Broadcasting Corp. v. Cohn* 420 U.S. 469 (1975), the existence of issues of fact does not preclude this Court's examination of a federal constitutional question in cases such as *Rentar*. In *Cox Broadcasting Corp. v. Cohn, supra* (hereinafter "*Cox Broadcasting*"), this Court delineated four classes of cases in which it will review a federal constitutional question although there are additional state proceedings necessary to resolve the entire case. One of those categories was described by this Court as follows:

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Cox Broadcasting, supra,* at 481

That is exactly the situation presented in *Rentar*. In that case, defendant moved to dismiss an action to foreclose a mechanics lien upon the grounds that the Lien Law was unconstitutional, and that the plaintiffs were not proper lienors. The New York State Supreme Court and Appellate Division found the Lien Law to be constitutional, and found plaintiff's status thereunder to constitute an issue of fact to be tried. The Court of Appeals affirmed. *Rentar*

85 Misc. 2d 304 (Sup Ct., Queens Co. 1976) *aff'd* A.D.2d 30 (2d Dept. 1978) *aff'd* 43 N.Y.2d 952 *dismissed for want of substantial Federal question* 439 U.S. 804 (1978), *supra*. Thus, if defendant had prevailed on the merits, there would be no further review of the constitutional question; if it lost on the merits, it had already presented the question to to the highest court of the State and could not again present it. The case was, therefore, ripe for adjudication by this Court. The dismissal was on the merits of the constitutional question.

In addition, the allegations that petitioner herein now relys upon as indicating that this Court's dismissal in *Rentar* was not on the merits were made in connection with the motion by the Appellees in Rentar to *affirm* the decision of the New York State Court of Appeals. Appellee's motion to dismiss or affirm at 8, *Rentar* No. 77-1775. This Court did not affirm in *Rentar*, rather it dismissed under Sup. Ct. R. 16.1(b). As this Court must be presumed to know its own rules and the effects of its decisions, it must be presumed that the Court intended its dismissal to be on the merits.

II

THE NEW YORK MECHANIC'S LIEN LAW DOES NOT IMPAIR A SUBSTANTIAL PROPERTY INTEREST

While it may be irrelevant in light of this Court's action in *Rentar*[1], the following discussion serves to show that the same result has been reached by other federal courts in similar circumstances. The New York Appellate Division in *Rentar* carefully analyzed this Court's holdings in *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Sniadach v. Family Finance Corp.* 395 U.S. 337 (1969), *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974), and *North Georgia Finishing v. Di-Chem* 19 U.S. 601 (1975)—all of which held that a

[1] See discussion at I *supra*.

person cannot be deprived of a "significant" property interest without prior notice and hearing—and determined that the New York Mechanic's Lien Law does not result in the deprivation of a "significant property interest". In affirming on the opinion below, the New York Court of Appeals said:

> "...it is observed that the dissenting opinion at the Appellate Division confuses the impact of a lien on property which does not dispossess the owner with the line of cases in the Supreme Court of the United States involving precisely such dispossession by seizure without preliminary judicial determination...." 43 N.Y.2d at 953.

The New York Courts are not alone in their analysis of the issue. In *Ruocco v. Brinker*, 380 F. Supp. 432 (S.D. Fla. 1974) the Mechanic's Lien Law of Florida, which is substantially similar to New York's Law, was upheld. Similarly, the Arizona Law was upheld in *Spielman-Fond v. Hanson's, Inc.*, 397 F. Supp. 997 (D.C. Ariz. 1973) *aff'd* 417 U.S. 901 (1974), as well as the South Dakota law in *Cook v. Carlson*, 364 F. Supp. 24 (D.C.S.D. 1973).[2] In addition to their own independent analyses, the various courts relied strongly on this Court's summary affirmance in *Spielman-Fond v. Hanson's, supra*. As stated by the court in *Williams & Works, Inc. v. Springfield Corp., supra* at 332:

> "Although a summary affirmance cannot necessarily be read as an affirmance of the reasoning of the lower court, it is nevertheless a resolution on the merits of the issues presented to the Supreme Court and is consequently binding upon lower courts."

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[2] In the following state court cases similar mechanic's lien laws were upheld: *Keith Young & Sons v. Victor Senior Citizens Housing, Inc.*, 262 N.W.2d 554 (Iowa, 1978); *Williams & Works, Inc. v. Springfield Corp.*, 265 N.W.2d 328 (Mich., 1978); *Silverman v. Gossett*, 553 S.W.2d 581 (Tenn. 1977); *South Central District v. Bruce-Rogers Corp.*, 559 S.W.2d 702 (Ark. 1980); *Mobile Components, Inc. v. Lavon*, 623 P.2d 591 (Okla. 1980); *Connelly Development, Inc. v. Superior Court of Merced Co.*, 553 P.2d 637 (Cal. 1976).

The two cases which held their state's mechanic's lien laws to be unconstitutional, *Barry Properties, Inc. v. Fick Brothers Roofing Co.*, 353 A.2d 222 (Md. 1975), and *Roundhouse Const. Corp. v. Telesco Masons Sup.*, 362 A.2d 778 (Conn. 1975), found their laws not to be sufficiently similar to Arizona's. Significantly, in citing the *Spielman-Fond* Arizona case, the New York Appellate Division applied the reasoning of the three-judge lower court and did not rely on the binding force of this Court's affirmance of that case.

As already stated, the New York Appellate Division in the *Rentar* case specifically held that the filing of a notice of lien created a cloud on the owner's title and is similar to a *lis pendens* notice. It does not prohibit a sale of the property but rests on the policy that a lienor's action should not be defeated by alienation of the property during the course of the lawsuit. See *Welch v. Schiffman*, 80 A.D.2d 683 (1981) and, similarly with respect to a *lis pendens*, see *Fiddlers Green Assn. v. Construction Corp. of L.I., Inc.*, 20 Misc.2d 473 (1959) *rev'd. on other grounds*, 12 A.D.2d 207. Thus, the filing of a notice of mechanic's lien does not dispossess the owner of his property nor prohibit him from alienating his property. It is simply a public notice that some one other than the owner claims an interest in that property.

Since the issue here is not whether there is a property interest involved but a *"significant"* property interest, it should be noted that Appellant has presented no facts to justify departure from that rule or reconsideration of the *Rentar* case. In fact, reference to Appellant's answers to Den-Al's interrogatories is appropriate. For example:

> *Den Al Interrogatory No. 9:*
>
> "Set forth (a) all proposed contracts to sell the Staten Island Mall, (b) all proposed leases for space any of which were not consummated by reason of the mechanic's liens which were filed by the defendants or any of them."

Rouse Response to Interrogatory No. 9

"No such contracts, leases, or financing exist." Thus, Appellant has presented nothing to show that it is being injured or hindered by the presence of the lien pending the conclusion of an action to enforce the lien.

Since there has been no deprivation of a significant property interest, it should not be necessary to pass upon the issues of whether or not there has been a violation of Appellant's right to due process. The concept of due process is a dynamic one, expanding and contracting with the needs of society. In Constitution of the United States of America - Analysis and Interpretation, prepared by Congressional Research Service of the Library of Congress, 1976 supplement to 1972 edition, at pages S140-S141 is found:

> "Fifth, in those cases in which the Court finds protected interests, it has adopted in recent cases a balancing approach that has resulted in different and less stringent procedural guarantees being imposed. For example, the previous cases had focused upon the interests of debtors and installment buyers in not being unjustly deprived of the property in their possession and thus requiring predeprivation hearings (citing *Fuentes* v. *Shevin* and *North Georgia Finishing* v. *Di-Chem*). The newer cases look to the interests of both creditor and debtor. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." (citing *Mitchell* v. *W.T. Grant Co.*)

The various courts which have sustained the constitutionality of Mechanic's Lien Laws have recognized the lienor's interest in the

CONCLUSION

We ask this Court to deny petitioner's request for a Writ of Certiorari in its entirety.

Respectfully submitted,

PAULA SCHWARTZ FROME, ESQ.
1501 Franklin Avenue
Mineola, New York 11501
(516) 742-9415

GEORGE R. GRIDEL,
LEONARD R. BERSON
RONALD S. KAHN
RALPH P. CASSELLA
of Counsel